

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DE LA ROSA,

Defendant and Appellant.

H023604

(Monterey County
Super. Ct. No. SS002089)

Jose De La Rosa pleaded no contest to aggravated assault (Pen. Code, § 245, subd. (a)(2)), admitted using a firearm during the assault (Pen. Code, § 12022.5, subd. (a)) and admitted that his conduct caused the infliction of great bodily injury. (Pen. Code, § 12022.7, subd. (a).)¹ He was sentenced to 16 years in prison and ordered to pay a \$3,200 mandatory restitution fine. (§ 1202.4.) The trial court suspended imposition of a parole revocation fine in the amount of \$3,200. (§ 1202.45.) On appeal, De La Rosa argues that the trial court violated his plea bargain by imposing the \$3,200 restitution fine. We will modify the judgment to reduce the restitution fine to \$200.

FACTS AND PROCEDURAL BACKGROUND

On August 14, 2000, Elizabeth Huerta and her friend Sylvia visited a house in Seaside, California. Also present was Edwin Reyes, a Sureno gang member. At some point, Sylvia and Reyes argued with Norteno gang members. Gang signs were flashed.

¹ All further unspecified statutory references are to the Penal Code.

Later that evening, Huerta, Sylvia and Reyes exited the Seaside house. Once outside, they encountered two males on bikes. Both males were Norteno gang members. One of the males pulled out a gun and shot Huerta. Reyes was also shot. Reyes identified the shooter as defendant, whom he knew from prior gang incidents.

Defendant was charged with two counts of attempted premeditated murder (§§ 664/187, subd. (a)) and aggravated mayhem. (§ 205.) Each count was accompanied by gang enhancement allegations. (§ 186.22, subd. (b)(1).) Subsequently, the information was amended to charge defendant with assault with a firearm (§ 245, subd. (a)(2)), with allegations that he used a .44 magnum firearm (12022.5, subd. (a)), that the assault caused the infliction of great bodily injury (§ 12022.7, subd. (a)) and that the assault was motivated by his gang affiliation. (§ 186.22, subd. (b)(1).)

Pursuant to a negotiated plea bargain, defendant pleaded no contest to one count of aggravated assault, admitted the firearm and great bodily injury enhancements, and in exchange was promised a maximum sentence of 16 years.

After the trial court described the nature of the plea agreement, it gave defendant the standard advisements regarding the consequences of pleading guilty. Toward the end of those advisements, the trial court stated that “In addition, there will be, as required by law, a state restitution assessment and the Court also will be looking at the probation report and any additional evidence as to any victim restitution, which will be taken up by the Court at the time of sentencing.”

Defendant was never advised, pursuant to section 1192.5, that acceptance of the plea bargain was conditional and that defendant would be permitted to withdraw his plea if the court announced an intention not to comply with the terms of the bargain.²

² Section 1192.5 provides, in relevant part, as follows: “Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed

At the sentencing hearing, the trial court imposed a fine of \$3,200 to the state restitution fund “pursuant to [section] 1202.4(b)(1)” A second fine, also for \$3,200, and entered pursuant to section 1202.45, was suspended pending revocation of parole.

This appeal ensued.

DISCUSSION

Defendant argues that the trial court violated his plea bargain by imposing a mandatory restitution fine of \$3,200. We agree.³

A restitution fine is required “[i]n every case” where an individual is convicted of a felony unless the trial court finds on the record “compelling and extraordinary reasons” for not imposing the fine. (§ 1202.4, subd. (b).) The trial court has discretion to set the amount of the fine so long as it is not “less than” \$200 and “not more than” \$10,000. (§ 1202.4, subs. (b)(1), (d).) A statutory formula, which a trial court may follow, authorizes the court to impose a restitution fine based on \$200 for every year of imprisonment, multiplied by the number of felony counts. (§ 1202.4, subd. (b)(2).)

People v. Walker (1991) 54 Cal.3d 1013 discusses the issue of restitution fines in the context of plea bargains and waiver. In *Walker*, the defendant pleaded guilty to attempted use of a destructive device in return for a five-year prison sentence with credit for time served. The trial court orally explained to defendant that “ ‘the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state

as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”

³ Both parties agree that the waiver of rights form that defendant completed is not pertinent to the analysis of the issues raised on appeal.

prison and a fine of up to \$10,000, . . . ’ ” (*Id.* at p. 1019.) Although the trial court sentenced defendant in accordance with the plea bargain, the court also imposed a \$5,000 restitution fine, without objection, “although the plea agreement did not mention such a fine.” (*Id.* at p. 1019.) The probation report had recommended a \$7,000 fine. The trial court did not give a section 1192.5 admonition. (*Id.* at pp. 1029-103.)

The California Supreme Court decided that the restitution fine should be reduced to the statutory minimum. *Walker* found that “[a]bsent compliance with the section 1192.5 procedure, the defendant’s constitutional right to the benefit of his bargain is not waived by a mere failure to object at sentencing.” (*People v. Walker, supra*, 54 Cal.3d at p. 1025.) The Supreme Court also determined that the \$5,000 fine was “a significant deviation from the negotiated terms of the plea bargain” (*id.* at p. 1029), and that defendant was entitled to a remedy. It explained that “[a] violation of a plea bargain is not subject to harmless error analysis” and that “[a] court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer.” (*Id.* at p. 1026.) It concluded that “[r]educing the fine to [the statutory minimum, then \$100] would . . . achieve substantial compliance with the terms of the plea bargain without violating the statutory requirement of a restitution fine.” (*Id.* at p. 1028.)

Applying the principles it enunciated to the facts before it, *Walker* stated: “The trial court only advised the defendant that a \$10,000 fine was a possible consequence of the guilty plea. This was inadequate. The court should have advised defendant there was a possible \$10,000 penalty fine *and* a mandatory restitution fine of between \$100 and \$10,000. This error, standing alone, would not entitle defendant to a remedy for two reasons.

“First, defendant waived the error by not objecting to the fine when it was imposed. Second, he has not shown prejudice. Although the court advised him of a possible \$10,000 fine (with the nature of the fine unspecified), it imposed no penalty fine

at all and only a \$5,000 restitution fine. Since the actual fine imposed was *less* than that advised, defendant was not prejudiced by the incomplete admonition.

“However, the \$5,000 restitution fine was a significant deviation from the negotiated terms of the plea bargain. Since the court did not give the section 1192.5 admonition, and this was not merely a failure to advise of the consequences of the plea, defendant cannot be deemed to have waived his rights by silent acquiescence. Nor did he waive them expressly. As harmless error analysis is not applicable, defendant is entitled to a remedy. The error was raised for the first time on appeal. Therefore, the fine must be reduced to the minimum of \$100.” (*People v. Walker, supra*, 54 Cal.3d at pp. 1029-1030.)

In this case, the Attorney General argues that the plea bargain was not violated because the trial court advised defendant that restitution would be imposed. The Attorney General relies upon the trial court’s statement that “there will be, as required by law, a state restitution assessment and the Court also will be looking at the probation report and any additional evidence as to any victim restitution, which will be taken up by the Court at the time of sentencing.” We disagree.

The trial court’s comments were made as part of its advisements on the consequences of defendant’s plea. The comments were not made as part of the trial court’s description of defendant’s plea agreement. While the trial court’s failure to advise defendant of the range of permissible mandatory restitution amounts, from \$200 to \$10,000 could be subject to a harmless error analysis, its failure to include the restitution fine in its description of defendant’s plea bargain is not (given the absence of the section 1192.5 admonition). The trial court never informed defendant that a mandatory restitution fine of \$3,200 was part of his plea agreement.

In *Walker*, the trial court advised defendant only of a possible \$10,000 fine but did not specify the nature of the fine. The *Walker* court explained that the error would not have entitled defendant to relief except that the \$5,000 restitution fine was a significant

deviation from the negotiated terms of the plea bargain and the court did not give the section 1192.5 advisements. (*People v. Walker, supra*, 54 Cal.3d 1029-1030.) Similarly, in this case, the trial court advised defendant of an unspecified state restitution assessment, which failure might not have entitled defendant to relief, except that the \$3,200 mandatory restitution fine ultimately imposed deviated from the terms of the plea bargain and the section 1192.5 advisements were not properly given.

The Attorney General suggests defendant's failure to object waived the issue. However, as the Attorney General acknowledges, the trial court did not comply with the part of section 1192.5 concerning defendant's right to withdraw from the plea if the judge deviates from its terms. When a defendant is not admonished as required under section 1192.5, the failure to object does not constitute a waiver. (*People v. Walker, supra*, 54 Cal.3d at p. 1025.)

The Attorney General also contends that the deviation from the plea bargain was insignificant and therefore not constitutionally impermissible. However, *Walker* emphasized that a violation of a plea bargain is not subject to harmless error analysis because what is at stake is the honor of the government and public confidence in the administration of justice. (*People v. Walker, supra*, 54 Cal.3d at p. 1026.) Although *Walker* suggested that an insignificant deviation would not violate the defendant's rights, *Walker* also stressed that "[c]ourts should generally be cautious about deeming nonbargained punishment to be insignificant." (*Id.* at pp. 1027-1028, fn. 3.)

In this case, the \$ 3,200 restitution fine imposed was 16 times the \$200 statutory minimum. For these reasons, we deem it to be significant and will therefore reduce the restitution fine to the statutory minimum of \$200.

DISPOSITION

The judgment is modified to reduce the restitution fine from \$3,200 to \$200. The trial court is directed to prepare an amended abstract of judgment reflecting this

modification and forward the amended abstract to the Department of Corrections. The modified judgment is affirmed.

RUSHING, J.

WE CONCUR:

BAMATTRE-MANOUKIAN, ACTING P.J.

MIHARA, J.